Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

ROMAN LAW IN MODERN LIFE AND EUDCATION[1]

By Albert R. Crittenden
University of Michigan

Few nations in the world's history have made so large or so original contributions to modern life as the Romans. It has often been observed that their most distinctive achievements were in the great fields of law and administration. To them many nations of the modern world are chiefly indebted for their legal inheritance. The law of France, Spain, and Italy is based directly upon the Roman law, like that of the Latin-American states. The law of Holland, Germany, and Switzerland has been profoundly influenced by the codification of Justinian. Some sections of American territory employ a modernized form of Roman law, as in Louisiana, Porto Rico, and the Philippines, due to former French or Spanish possession. These are but illustrations; the list might be greatly extended.

But there are two nations in history that have shown a pre-eminent genius for legal institutions—the Roman and the Anglo-Saxon. And there are two great streams of law in the modern world—modernized Roman law and English or Anglo-American law. A large fraction of the world's territory, and of its population as well, is under the rule of that other great body of law which has grown up among English-speaking folk. The United States and Alaska, British America, Great Britain, Egypt, South Africa, India, Australia, New Zealand, and many of the islands of the sea are governed in part or wholly by English law.

But English law, though mainly of independent origin, is not wholly unrelated to its older prototype. The extent of the indebtedness of English law to Roman law is an interesting and to some extent still an open question and forms the chief theme of

[1] Read at the Michigan Classical Conference, April 2, 1919.

this brief paper. It would be hardly seemly and might prove unjustifiable for a friend of the classics to make such sweeping claims in this connection as are made, by implication at least, by C. P. Sherman in his comprehensive work, *Roman Law in the Modern World.* As pointed out in the *Michigan Law Review*,[1] one might gain the impression from a cursory reading of the book that the whole fabric of English law was substantially derived from Roman law. A much more conservative statement of the case is contained in the scholarly essay of T. E. Scrutton on *Roman Law and the Law of England*, while the student who wishes to compare the Roman law with the English, point by point, will find numerous parallels and analogies pointed out by James Williams in his *Institutes of Justinian, Illustrated by English law.*

The evidence thus far presented by investigators seems to show that Roman law has exercised considerable influence upon the development of certain courts and branches of English law at certain periods, and that on other branches and at other periods its influence has been less plainly felt. In the Anglo-Saxon and Norman period very little evidence has yet been forthcoming to show the derivation of early English law from Roman. It seems well-nigh incredible that four centuries of Roman occupation should leave no traces in the later civilization of the country, or that the presence in the island province of the most renowned of the imperial jurists should be of no lasting effect despite its conquest by Teutonic invaders. Nevertheless, direct and tangible results of the Roman occupation in the realm of law have been thus far extremely hard to find. Seebohm's theory[2] of a mingled South-German and Roman origin of the early English land law is interesting, but can hardly be regarded as established fact.

After the middle of the twelfth century the case was different. The seeds of a new and more liberal learning were springing up all over Europe, to bear fruit in the rise of universities in the next century. From the famous school of law—Roman law, of course—at Bologna, the Lombard Vacarius, a pupil of the great Irnerius, came to England in the train of Theobald, Archbishop

[1] XVI, 281.

[2] F. Seebohm, *English Village Community.*

of Canterbury. By 1149 he was giving lectures on the civil law at the youthful University of Oxford, and the study has been connected with that great seat of learning ever since. The most honorable title conferred by the University, that of D.C.L., was originally a degree in Roman law. Probably the most famous incumbent of the chair of Civil Law at Oxford is James Bryce, well known and admired everywhere in America no less than in England. Vacarius published an abbreviated edition of the Code and Digest of Justinian, designed for students who could not afford the originals. The new teaching excited the displeasure of King Stephen, but his opposition was soon overcome and the study of the civil law at Oxford and elsewhere in England went on and prospered.

Nevertheless, the great vigor of the native law is shown by the comparatively slight traces of Roman influence shown in the first important work on the laws of England, attributed to Ranulph de Glanvil, between 1180 and 1190. At various points Glanvil compares the English with the Roman law, and the form of some parts, notably his preface, appears to have been modeled upon Justinian. In one section of the work, the Tenth Book, dealing with the law of contracts, both terminology and form clearly suggest Roman models. The author was evidently acquainted with the civil law, but the great bulk of his work is still almost wholly English.

Far more important was the comprehensive treatise of Bracton, *On the Laws and Customs of England*, which for the first time set forth English common law as a science. Henry de Bracton was Chief Justiciary of England during part of the reign of Henry III. His monumental commentary, which appeared about 1258, was written in Latin, like Glanvil's, and aims to present a faithful and detailed exposition of the English law of his time, arranged in systematic order. The plan of the work and from one-fourth to one-third of its contents are either derived from or strongly influenced by Roman sources. Bracton quotes freely from Justinian, without acknowledgment as a rule, sometimes directly from the Institutes or the Digest, but much more often from the *Summary* of the famous Italian Azo, of the School of the Glossators

at Bologna. The sections chiefly derived from Roman law deal with the law of persons, with acquisition of property and with contracts. In places the Roman law is modified to accord with the law of England, with omission of conflicting portions. A larger section, in which Roman principles furnish the framework, with English matter molded on them, deals with donations, possession, inheritance, and in outline with actions and obligations. English law is also indebted to Bracton for a large Latin terminology still in use.

It is an interesting question whether the Roman law material in Bracton had already been adopted by English courts, or was a deliberate addition by the author. Güterbock has presented evidence to show that Bracton used only Roman law which had become English law, sometimes citing English precedents for Roman principles.[1] Scrutton believes that Bracton both introduced new Roman matter to make his outline complete, and also cited English law already derived from the Roman.

For the next three or four centuries Bracton's work remained the standard exposition of English law, referred to either in its original form or in abridgments such as those known by the names of Fleta and Britton. Within a generation of Bracton's time began the reign of Edward I, the period of rapid formulation and consolidation of English law—days which determined, in the words of Hale, "the very mold and model of English Law." So marked was the influence of Roman law in these days that the period from the coming of Vacarius to England to the end of the reign of Edward I is sometimes styled the Roman period of English legal history.

The next great expositor of English law was Sir Edward Coke, Chief Justice of England under James I, four hundred years after Bracton's time. In his *Institutes*, despite their Latin title, he minimized the importance of Roman law in England, though speaking of the Court of Admiralty as "proceeding according to the civil law," and citing Bracton frequently, even passages of Roman origin. Evidently Coke had slight acquaintance with

[1] C. Güterbock, *Bracton and His Relation to the Roman Law.* Translated and edited by Brinton Coxe.

Roman law, and was a strong supporter of the common law, as opposed to any foreign law whatever. For the next century and a half the general acceptance of the *Institutes* as the standard text in English law tended to decrease the influence of Roman law in England. Moreover, in this period both religious and political feeling militated against the popularity of anything of Roman origin.

The last systematic exposition of the Common Law of England was Blackstone's *Commentaries*, published in 1765. To a considerable extent Blackstone adopts a Roman form and terminology, though holding that the civil law is without intrinsic force and obligation in England, except in some courts and in some cases, where on account of some peculiar propriety it has been introduced and allowed. Still, he often uses the Roman law as a basis of comparison, and sometimes as the origin of an English rule. Sherman has pointed out the interesting fact that the portion of Blackstone which remains good law today in its original form is that on personal property, in which Blackstone follows Bracton, who in turn quoted from Justinian.

The question of the validity of the civil law in England has been a source of heated controversy among jurists both before and since Blackstone's day. The prevailing opinion is well stated by C. J. Tindall in a decision in *Acton* v. *Blundell* (1843): "The Roman law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion to which we have come, if it prove to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe."

It appears from this brief historical survey that English law in its most formative period was considerably influenced by the form and content of Roman law. It would also seem that the type of legal writer who seeks to make his work systematic in outline or philosophic in method is prone to be more or less influenced by the Roman jurists. It is interesting also to observe

which branches of English law have been most subject to such influence. Prominent among these is the Court of Chancery. The striking analogy between the English Court of Chancery and the development of the praetor's jurisdiction at Rome has often been remarked. While this does not necessarily argue a derivative relationship, there seems little reason to doubt that the Chancery Court was in fact strongly affected by Roman law principles. Most of the earlier chancellors were ecclesiastics, skilled in the canon and civil laws. The more lenient interpretation of mortgages adopted by the Chancery Court has been adduced as an illustration of the softening influence of Roman principles. In the handling of trusts, legacies, and the law of partnership Roman influence is also traceable. The testamentary jurisdiction of English courts, at first lodged in ecclesiastical courts, was probably derived from and modeled after Roman sources.

The Admiralty Court, as even Coke admitted, proceeded according to the civil law, and was closely associated with the Law Merchant. This was a body of rules originating in the countries bordering on the Mediterranean Sea, from the exigencies of international traffic. There were several such written commercial codes in mediaeval times, of which two of the most important were the *Consolato del Mare*, employed in Spain, and the *Laws of Oleron*, embodying the usages of the Atlantic coast of France. Both were of Roman origin. The *Laws of Oleron* were adopted in England in the time of Richard I.

Stated in general terms, the influence of Roman sources on English law is most clearly apparent in those courts and those branches of law arising, first, from a softening or liberalizing tendency, like the equitable jurisdiction; and, second, from the body of common rules developed by commercial and other intercourse between citizens of different states, as the Admiralty Court and the Law Merchant.

The history of Roman law is largely concerned with the relation of two different bodies of law: an older, more rigid, and more formal law of the city of Rome, the *Ius Civile*, and a more liberal and flexible body of law arising in the praetor's court. The latter was based on the *Ius Gentium*, which was originally a body of rules

representing the common practice of a group of states. Of these two kinds of law the formal and rigid *Ius Civile* tended to decrease in relative importance, while the influence and scope of the more liberal and flexible *Ius Gentium* tended to increase. It would seem reasonable to expect that a similar tendency will manifest itself in the future development of English law; that with the marked increase of intercourse between nations, so characteristic of these latter days, those branches of law in which the systematizing, softening, and liberalizing influence of Roman law has been most apparent will tend to increase in relative importance, and that the value of the study of Roman law to the student of English law will grow greater rather than less.

Moreover, the present tendency of nations to combine and co-operate, if continued, must needs produce a body of common rules, which will acquire the force of law. With half or more than half the nations so co-operating already governed by modernized forms of Roman law it requires no prophet to anticipate that Roman law will furnish one of the great sources from which such interstate law must grow.

In another way the increasing interest in the study seems particularly timely. The recent great world-conflict has brought moral and ethical considerations sharply to the fore in the world's thinking. At every point in his study of Roman law the student finds ethical and humane principles emphasized. The trend of its whole argument is steadily and consistently toward the just definition of the rights of men. In essence Roman law is the scientific search after justice and right.